(3rd C)

FILED

NOV 30 1972

IN THE

Supreme Court of the United States

October Term, 1972

No. 694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

Appellants,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellees,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Appellees,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF APPELLEES NYQUIST, LEVITT AND GALLMAN TO DISMISS APPEAL OR TO AFFIRM JUDGMENT APPEALED FROM

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Appellees Nyquist, Levitt and Gallman
Capitol
Albany, New York
Telephone: (518) 474-7138

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Solicitor General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

TABLE OF CONTENTS.

CONSTITUTION.

STATUTE CITATIONS.

CASE CITATIONS.

IN THE

Supreme Court of the United States

October Term, 1972

No. 694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON and CHARLES H. SUMNER,

Appellants,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellees,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Appellees,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF APPELLEES NYQUIST, LEVITT AND GALLMAN TO DISMISS APPEAL OR TO AFFIRM JUDGMENT APPEALED FROM

Pursuant to Rule 16 of the Rules of this Court, the appellees Nyquist, Levitt and Gallman move to dismiss the appeal herein, on the ground that it does not present a substantial federal question, or to affirm the judgment appealed from, on the ground that the questions raised are so insubstantial as not to need further argument.

Statute Involved

The statute involved on this appeal is Chapter 414 of the New York Laws of 1972, set forth as an Appendix to the Jurisdictional Statement of the Appellants. The provisions of that Chapter at issue on this appeal are contained in sections 3, 4 and 5. Section 3 provides as follows:

> "§ 3. Legislative findings. The legislature hereby finds and declares that:
>
> "1. Statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions.
>
> "2. Nonpublic educational institutions are themselves entitled to tax exempt status by virtue of legislation which has been sustained by the courts.
>
> "3. Such educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for these children.
>
> "4. Tax laws also authorize deductions for education related to employment.
>
> "5. The legislature hereby finds and determines that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents for whom exemptions are claimed under the tax law."

Section 4 of the Chapter adds to the list of items to be subtracted from gross income, as computed for Federal income tax purposes, a paragraph 14 referring to the amount to be subtracted as provided in section 5 of the Chapter.

Section 5 adds a new subsection j to section 612 of the New York Tax Law (McKinney's Consolidated Laws), which section details the computation of adjusted gross income for the purposes of the New York State income tax. The new subsection provides:

> "(j) Modification for nonpublic school tuition. (1) General. An individual shall be entitled to subtract from his federal adjusted gross income an amount shown in the table set forth in this paragraph for his New York adjusted gross income for the taxable year, computed without the benefit of this modification, multiplied by the number of his dependents, not exceeding three, attending a nonpublic school on a full-time basis for at least four months during the regular school year for the education of such dependent in grades one through twelve, provided such individual is allowed an exemption under section six hundred sixteen for such dependent. Provided, further, that the modification under this paragraph may be taken only if such individual has paid at least fifty dollars for each such dependent in tuition to such nonpublic school for such education of such dependent. No taxpayer shall be entitled to the modification provided for in this paragraph if he claims a tuition reimbursement payment pursuant to article twelve-A of the education law.

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than $ 9,000	$1,000
9,000 — 10,999	850
11,000 — 12,999	700
13,000 — 14,999	550
15,000 — 16,999	400
17,000 — 18,999	250
19,000 — 20,999	150
21,000 — 22,999	125
23,000 — 24,999	100
25,000 and over	-0-

"(2) Husband and wife. In determining the applicable New York adjusted gross income of a husband and wife for the purposes of the table set forth in paragraph one of this subsection, the New York adjusted gross income of a husband and wife shall be the aggregate of their New York adjusted gross incomes for the taxable year, determined without the benefit of the modification provided for in this subsection, and the number of dependents with respect to which this modification may be claimed shall be no more than three in the aggregate.

"(3) Definitions. (A) 'Tuition', as used in this subsection shall mean the amount actually paid during the taxable year by the taxpayer for the enrollment of a dependent during the regular school year at a nonpublic school.

"(B) 'Nonpublic school', as used in this subsection, shall mean any non-profit elementary or secondary school in the state of New York, other than a public school, which (i) is providing instruction in accordance with article seventeen and section thirty-two hundred four of the education law, (ii) has not been found to be in violation of Title VI of the Civil Rights Act of nineteen hundred sixty-four, 78 Stat. 252, 42 U. S. C. § 2000(d) and (iii) which is entitled to a tax exemption under sections five hundred one (a) and five hundred one (c) of the Federal Internal Revenue Code

of nineteen hundred fifty-four, as amended. The commissioner of education shall furnish to the state tax commission by February first of each year, a certified list of nonpublic schools which comply with clause (i) of this subparagraph for the preceding calendar year and shall provide such other assistance with respect to whether nonpublic schools come within clause (i) as the state commission may require.

"(C) 'Regular school year', as used in this subsection shall mean the months of the taxable year exclusive of July and August.

"(4) Additional information. Any claim for a modification under this subsection shall be accompanied by such information as the tax commission may require."

Section 11 of Chapter 414 provides for the separability of remaining provisions of the statute from any part thereof which may be held invalid by a Court.

Questions Presented

1. Does a State statute, which authorizes a deduction from gross taxable income to parents paying nonpublic school tuition for their children, infringe upon the Establishment Clause of the First Amendment to the Constitution of the United States?

2. Where the interrelation of tuition reimbursement and income modification provisions in the statute are solely for the purpose of assuring that low income parents elect between one of the two provisions and do not receive a double benefit, are the provisions separable?

Statement of the Case

Plaintiffs commenced this action seeking to have sections 1, 2, 3, 4 and 5 of Chapter 414 of the New York Laws of 1972 declared unconstitutional, alleging that those provisions violate the Establishment Clause of the First Amendment to the Constitution of the United States. The complaint also sought an injunction restraining payments of State funds in implementation of sections 1 (health and safety grants to nonpublic school buildings) and of section 2 (tuition reimbursement to low-income parents) of the act and restraining the implementation of sections 3, 4 and 5 of the statute.

A motion to intervene in the action was made by several parents of children enrolled in nonpublic schools and who would be beneficiaries of the challenged provisions of the act. The motion was granted.

A motion to intervene in the action was also made by Earl W. Brydges, the Majority Leader and President *Pro Tem* of the New York State Senate. That motion was also granted.

The District Court, in its decision, specifically found that it accepted the findings of the Legislature as to the purposes of the enactments, and that those findings sum up legislative purposes which are secular in intent. Thus, as relevant to this appeal, the Court expressly started with the assumption that "taxpayers as a body have, indeed, been relieved up to now of the burden of providing public school education for the children who attend nonpublic schools" and that the legislative intent is to give tax relief to "our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools,

as is their constitutional right." Relying primarily upon the recent decisions of this Court in *Lemon* v. *Kurtzman* (403 U. S. 602 [1971]), *Tilton* v. *Richardson* (403 U. S. 672 [1971]), and *Walz* v. *State Tax Commission* (397 U. S. 664 [1970]), the Court held that public moneys may not be used for the repair or maintenance of nonpublic school buildings in which the religious and secular functions are combined (Chapter 414, section 1); and that the State could not provide for reimbursement to low-income parents for tuition paid by them to nonpublic schools which their children attend (Chapter 414, section 2). That Court's decision on those issues has been appealed to this Court by the defendants in the action.

As to the modification of gross income provided by sections 3, 4 and 5 of Chapter 414, the provisions at issue here, the majority of the Court found that those provisions stand in a different position. The Court found that the modification of income provision is not restricted to geographic areas which contain "practically only Catholic parochial schools"; that it covers attendance at all nonprofit private schools in the State; that it does not involve a subsidy or grant of money from the State Treasury; that it has a particular secular intent—one of equity—to give some recompense by way of tax relief to persons who both pay school taxes to support the public schools and also send their children to nonpublic schools; that the benefit to the parochial schools is so remote as to not involve any impermissible financial aid to church schools; and that these provisions result in a minimum of administrative entanglement with the nonpublic schools.

The Court equated the tax credit provisions of Chapter 414 with the property tax exemption held valid in the *Walz* case, *supra*. In both cases, the Court said, the tax relief

confers some indirect economic benefit upon religious institutions. In the instant case, however, the Court observed, the income tax exemption is to individuals, not to churches or schools, and is, thus, a step removed from the tax exemption to the institutions approved in the *Walz* case.

The Court specifically noted that both the secular purpose and effect of the tax relief provision is "strong", stating:

> "The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute."

The dissenting Judge, Circuit Judge HAYS, would have held that there is no legal difference between tuition reimbursement, which the Court held invalid, and the modification of gross income for income tax purposes, which the majority of the Court held valid. The dissenting Judge also would have found the statutory provisions inseparable, thus invalidating sections 3, 4 and 5 because section 2 had been invalidated. Judge HAYS assumed that the tax relief provisions begin at the income point where tuition reimbursement leaves off. That, however, is not an accurate statement of the terms of the statute. Tuition reimbursement, under section 2 of Chapter 414, would be available to families with incomes of less than $5,000. Tax relief would be available to anyone, having less than $25,000 income, since the lowest category applies to persons with less than $9,000 income. The statute merely requires an election between tuition reimbursement and tax relief.

ARGUMENT

I. The Establishment Clause.

The New York State Constitution, Article III, § 22 establishes the powers of the State Legislature in the enactment of income tax legislation. That section provides that the Legislature, in imposing any tax to be measured by income, may define the measure of the income to be taxed, and may prescribe exceptions to and modifications of any such provision at any time.

New York Tax Law (McKinney's Consol. Laws), § 612(a) provides that the New York adjusted gross income of a resident individual means his Federal gross income as defined by the laws of the United States. Generally, deductions and exemptions from gross income, for the purpose of determining net taxable income, are the same as those employed in determining Federal net taxable income. There are, however, additions to and exclusions from gross income which are provided solely in the New York State law. For example, a deduction is not allowed on State returns for income taxes paid to the State, although it is allowed on Federal returns; and deductions for life insurance premiums have been allowed on State returns, although not on Federal.

The addition of new subsection j to section 612 of the New York Tax Law, by Chapter 414 of the New York Laws of 1972, was no more and no less than an exercise of the State's inherent power to determine the measure of personal income subject to taxation by the State. Accordingly, it presents no substantial Federal constitutional question for resolution by this Court.

The new subsection adds a provision for modification of gross income, in determining net taxable income, for those

parents who pay tuition for their children attending nonpublic schools. The provision sets up the modification as a fixed amount deductible from gross income for each child, not exceeding three, attending nonpublic schools. The fixed amount varies, depending upon the unadjusted gross income of the parents, with the largest deduction available to those with the lowest incomes. A parent with an income less than $5,000 must elect either the modification of gross income or tuition reimbursement provided by Education Law, Article 12-A, as added by Chapter 414 of the Laws of 1972, and may not obtain the benefits of both provisions.

This Court has recognized as a basic principle that a state has the inherent right to be free, in the normal exercise of the power to tax, to select the subjects of taxation and to grant exemptions from taxation, and that inequalities which may result from a singling out of one particular class for taxation or exemption from taxation infringes upon no constitutional rights or limitations upon the powers of the states. (*Carmichael* v. *So. Coal Co.*, 301 U. S. 495 [1937]; *People ex rel. Moffet* v. *Bates*, 276 App. Div. 38, affd. 301 N. Y. 597, cert. den. 340 U. S. 865 [1950]).

This Court has also held that the property of sectarian institutions may constitutionally be exempted from taxation (*Walz* v. *State Tax Commission, supra*). In so doing, this Court stated in that case (397 U. S., p. 678):

> "Nothing in this national attitude toward religious toleration and two centuries of uninterrputed freedom from taxation has given the remotest sign of leading to an established church or religion, and on the contrary it has operated affirmatively to help guarantee the free exercise of all religious beliefs. Thus it is hardly useful to suggest that tax exemption is but the 'foot in the door' • • • leading to an established church."

As the Court below pointed out, while deductions from taxable income for contributions to sectarian institutions have not had 200 years of history, as has real property tax exemption for those institutions, this is because income taxation is of more recent vintage; but that, since the income tax laws have existed, tax deductions have been permitted for contributions to churches and to religious schools.

Recognizing that tax exemptions for nonpublic school tuition payments can work an indirect benefit to the schools, the Court below found no more of a benefit in such an instance than exists in tax exemption of religious property, an indirect benefit recognized but permitted by this Court's decision in *Walz*. As to the claim by the dissenting Judge in the instant case that tax deductions subsidize religious training for children, so, the majority of the Court below stated, does a tax deduction for contributions to a church subsidize religious worship. If the latter contribution is a valid tax deduction, why not the former as well? As to the argument made that in the case of contributions, the contributor does not receive a *quid pro quo* in exchange, while here his child receives an education, the majority of the Court below stated that that involves solely a problem of construction of the terms of a statute, the Internal Revenue Code, and not a constitutional question, since it is by the terms of the statute alone that a contribution must be made without value in exchange.

The Court also pointed out that the purpose of deductions for contributions is presumably to encourage those contributions and thus to benefit the churches. Appellant makes an argument that contributions to churches are made equally deductible with those to educational and charitable institutions which are nonsectarian in nature. If the purpose of permitting those contributions is to aid religion and

if that purpose is unconstitutional, it would not seem to matter whether the impermissible purpose was intermingled with permissible purposes. There is, for example, no constitutional barrier to State grants to nonsectarian private schools or to reimbursement of tution paid to nonsectarian private schools, yet this Court has held, in *Lemon, supra,* and in *Essex* (*Essex* v. *Wolman,* 342 F. Supp. 399, affd. ____ U. S. ____ [Oct. 10, 1972]), that provisions which would also benefit sectarian schools were invalid.

In upholding the tax statute provisions, the Court below stated its rationale, holding:

> "We think that * * * the credit against gross income of a fixed amount if tuition is paid to nonpublic schools, does not sponsor, or render forbidden financial support to church schools, at least in the limited form in which relief is given here. Credit is allowed not only to parents who pay tuition to a religious school but also to any nonprofit nonpublic secular school. The table in the statute is geared roughly to the tax brackets and the rate of tax imposed on each bracket. The result ranges from a small, almost token, forgiveness to a family which attains an adjusted gross income of almost $25,000 to a forgiveness roughly approximating the tuition cost of $50 per child for a family in the lowest bracket * * * And we believe the Legislature has power to decide between allowing deductions and allowing credits."

While the Court had held tuition reimbursement invaild on the ground, in part, that the parents are merely conduits for the money to the nonpublic schools (an issue which is the subject of defendants' appeal to this Court), in the case of the tax deductions, the Court found no traceable benefit to the schools, stating:

> "It seems to us unlikely, at least in the absence of strong proof, that a person having $6,000 to $9,000 per annum as an adjusted gross income would take his forgiveness or windfall, and hand it back to the

parochial school as additional tuition. He would, more likely, compensate himself for the tuition paid in an amount which would otherwise have gone to the State for income taxes. Thus, it is likely that while the State looses revenue, as it does generally in allowing charitable deductions, it does not aid the parochial school, as it may, indeed, do when it allows deductions for direct contributions to the church. If, in fact, persons in a somewhat higher tax bracket should forego the forgiveness and turn over the tax saving to the church, that would be a voluntary act, not different in kind from an ordinary church contribution. Indeed, it is to be hoped that at least part of the costs of educating poor children will come from this source."

The Court also found a primary secular purpose to the tax relief statute, stating:

"We note, moreover, that the secular purpose as well as its effect is strong. The lightening of the tax burden of those who contribute to public education while deriving no benefit from it for themselves, albeit theirs is a voluntary choice, is a legitimate legislative purpose. In effect, it is no different from giving some exemption from school tax to childless couples or the aged who no longer have children of school age. The Legislature certainly has a broad power to classify in a tax statute."

The Court below found no violation of the Establishment Clause of the First Amendment to the Constitution of the United States. We submit, that that Court was obviously correct in its holding. Consequently, there is no substantial Federal question which warrants the consideration of this Court, arising out of the State Legislature's exercise of its power to determine the measure of State taxation imposed on individual incomes. This appeal should, therefore, be dismissed or, in the alternative and based upon the opinion of the Court below, the decision should be affirmed insofar as it approves the modification of gross income provisions of the statute.

II. Separability.

The Court below found that the provisions of Chapter 414 are separable and that the provisions of sections 3, 4 and 5 of that statute could survive even though sections 1 and 2 were held invalid. The Court pointed out that the statute does contain a separability clause (§ 11) and further cited this Court's decision in *Tilton, supra,* in support of separability. In that case, this Court held a provision of the Higher Education Facilities Act of 1963 (20 U. S. C. §§ 711 *et seq.*) to be unconstitutional, but held that the remainder of the act was separable and valid. In so holding, the Court stated (403 U. S., pp. 683-684):

> "The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value. This circumstance does not require us to invalidate the entire Act, however. 'The cardinal principle of statutory construction is to save and not to destroy.' *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937). *In Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 234 (1932), the Court noted
>
> > 'The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'
>
> • • •
>
> "We have found nothing in the statute or its objectives intimating that Congress considered the 20-year provision essential to the statutory program as a whole. In view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect."

The statute at issue in the instant case had three broad objectives: protection of the health and safety of children attending nonpublic schools; financial relief to parents of nonpublic school children, either in the form of tuition reimbursement or tax relief; and additional aid to public schools in areas where nonpublic schools are closed. Appellants do not question the separability of the statute where the aid to public schools is concerned. They question only the separability of that part which provides tax relief to parents of nonpublic school children. We submit that this statute clearly meets the test of separability as did the statute involved in *Tilton*.

There is no evidence that the Legislature would not have enacted the tax relief provisions independently of the provisions held invalid by the Court below (which are also on appeal to this Court). There is no showing that the health and safety grant provisions were essential to the statutory program as a whole, nor that tax relief provisions could not have or would have been passed independently of those provisions of the statute which have been held invalid. The excision of sections 1 and 2 of the statute would impair neither the operation nor administration of the remainder of the statute. It is, in fact, clear that the Legislature intended each part of the statute to be separable and to survive independently of the others when it included a separability clause in the statute. The only interrelation between the tax relief and tuition reimbursement provisions is a requirement that low-income parents elect only one form of relief. Tax relief is equally available to low-income parents and only the option to choose tuition reimbursement would be denied them by the invalidation of section 2 of the act.

Since the provisions of sections 3, 4 and 5 of chapter 414 of the New York Laws of 1972 are separable from those of sections 1 and 2 of the statute, the appeal raises no issue on this point which warrants the consideration of this Court. This appeal should, therefore, either be dismissed or the decision below, as to sections 3, 4 and 5 of the act, affirmed.

CONCLUSION

The appeal should be dismissed or the judgment appealed from affirmed.

Dated: November 20, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellees
Nyquist, Levitt and Gallman
Capitol
Albany, New York
Telephone: (518) 474-7138

RUTH KESSLER TOCH
Solicitor General

JEAN M. COON
Assistant Solicitor General

Of Counsel